

Letter of Findings: 04-20120007
Gross Retail Tax
For the Years 2008, 2009, and 2010

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ISSUE

I. Exempt Transactions – Gross Retail Tax.

Authority: IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-8-9; IC § 6-8.1-5-1(c); IC § 6-8.1-5-4; *Rhoades v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); *Dep't of Treasury of Ind. v. Dietzen's Estate*, 21 N.E.2d 137 (1939); Sales Tax Information Bulletin 38 (December 2002); Sales Tax Information Bulletin 21 (May 2002).

Taxpayer argues that it was not required to collect tax on the sale of lawn care services to a company which held a "direct pay permit."

STATEMENT OF FACTS

Taxpayer provides lawn care services such as grass cutting, tree trimming, lawn maintenance, snow removal, and parking lot maintenance. The Department of Revenue ("Department") conducted an audit review of Taxpayer's business records which resulted in the assessment of sales/use tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Exempt Transactions – Gross Retail Tax.

DISCUSSION

Taxpayer sold lawn care services to one of its customers which held a "direct pay permit."

IC § 6-2.5-8-9 permits a select set of taxpayers to obtain a "direct pay permit" as follows:

- (a) A retail merchant, manufacturer, or wholesaler who is registered under this chapter may apply for a direct payment permit. The department may issue the permit subject to such conditions as it deems reasonable. A permit issued under this subsection does not expire and is valid unless revoked under subsection (c).
- (b) A person who possesses a direct payment permit may, at the time of a retail transaction, issue a direct payment certificate to a retail merchant instead of paying the state gross retail or use tax to that merchant. If the person issues a direct payment certificate, the person must then pay the tax on that purchase directly to the department. A retail merchant who receives a direct payment certificate has no duty to collect or remit the state gross retail or use tax on that transaction.
- (c) The department may revoke a direct payment certificate, without cause, at any time.

See also Sales Tax Information Bulletin 38 (December 2002), 26 Ind. Reg. 927 ("Registered retail merchants, wholesalers, and manufacturers may apply for a Direct Payment Permit, which enables them to remit use tax directly to the state rather than paying sales tax to their suppliers.")

Taxpayer provided its lawn care services to a customer which purportedly held just such a "direct pay permit" and did not collect sales tax or self-assess use tax on the supplies and equipment used to provide the lawn care services to this particular customer.

The provision of lawn care services is subject to sales tax as described in Sales Tax Information Bulletin 21 (May 2002), 25 Ind. Reg. 3939, as follows:

The sales tax is imposed on the gross retail income received in a retail unitary transaction. The gross retail income received includes the price of the property transferred plus any bona fide charges made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property before its transfer. Because the chemicals are not transferred until they are applied to the lawn, the application charges are included in the company's gross retail income. Therefore, the entire contract price is subject to the Indiana sales tax.

Indiana imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). Use means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See *Rhoades v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

Taxpayer failed to collect sales tax on any of its transactions; Taxpayer failed to self-assess use tax on any of the purchases it made such as "chain saws, mowers, trimmers, pruners, hoses, equipment rentals...." Therefore, the Department's audit assessed sales/use tax on the purchase of supplies and equipment Taxpayer acquired for its business.

However, Taxpayer has identified a series of equipment and supply purchases which it states were sold to the customer which held the direct pay permit. Based on that assertion, Taxpayer claims that it was error for the audit to include as taxable certain equipment and supplies purchased for or consumed in the provision of lawn care services for the direct pay customer.

In reviewing Taxpayer's assertions and as a threshold issue, it is Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana law has long held that, "In construing tax statutes a liberal rule of interpretation must be indulged in order to aid the taxing power of the state." Dep't of Treasury of Ind. v. Dietzen's Estate, 215 Ind. 528, 532, 21 N.E.2d 137, 139 (1939).

Taxpayer cites to various purchases which it believes are exempt on the ground that the item or items purchased were provided to its single customer which held a direct pay permit. For example, Taxpayer cites to 2009 purchases from "John Deere Landscapes," a purchase from "Erosion Runner Midwest," and a series of purchases from "Advanced Turf Solutions." While the Department has no reason to doubt Taxpayer's good intentions, there is nothing in the record which indicates that these particular transactions were specifically intended for Taxpayer's direct pay permit customer.

Taxpayer's records do not support its contention. Indiana law requires that Taxpayer's maintain records sufficient to establish what is taxable and what is not taxable. IC § 6-8.1-5-4 states that,

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

With no more than Taxpayer's recollection of what equipment and what supplies were purchased for what customer, it is not possible to sustain Taxpayer on the contested issue. Under IC § 6-8.1-5-1(c), Taxpayer has failed to meet its burden of establishing that the proposed assessment is wrong.

FINDING

Taxpayer's protest is respectfully denied.

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